

TERRY LEE SHANNON,  
PETITIONER

VS.

92-8346

UNITED STATES OF AMERICA,  
RESPONDENT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Terry Lee Shannon, asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has been represented by counsel appointed under the Criminal Justice Act at the trial of this action in the Northern District of Mississippi and on the appeal of his conviction before the Court of Appeals for the Fifth Circuit. Petitioner has previously been afforded counsel under the Criminal Justice Act at trial and on appeal, and as is permitted by Rule 39.1 in Criminal Justice Act cases, no affidavit is presented in support of this motion.

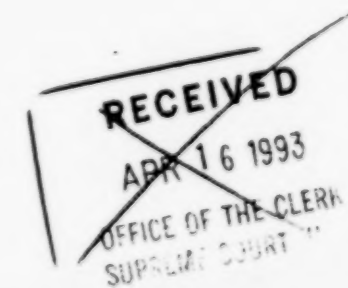
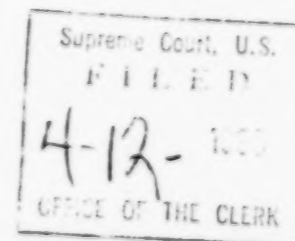
EDITOR'S NOTE

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32/88

92-345

No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

TERRY LEE SHANNON - PETITIONER

VS.

UNITED STATES OF AMERICA - RESPONDENT

PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Upon the adoption of the Insanity Defense Reform Act of 1984, for the first time in federal jurisprudence Congress provided for a mandatory commitment procedure when a defendant is acquitted because of insanity. The defendant in this case pleaded insanity and requested that the jury be instructed that he would be committed in conformity with the Act should the verdict be Not Guilty Only By Reason of Insanity. The trial court refused the instruction, and the Fifth Circuit affirmed.

Does a proper interpretation of the Insanity Reform Act of 1984 require that the jury be instructed that a Not Guilty Only By Reason of Insanity verdict will not result in the release of a possibly dangerous defendant contrary to the public welfare?

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No. \_\_\_\_\_

**IN THE SUPREME COURT  
OF THE  
UNITED STATES OF AMERICA**

October Term, 1993

**TERRY LEE SHANNON - PETITIONER**

VS.

**UNITED STATES OF AMERICA - RESPONDENT**

**PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

Petitioner Terry Lee Shannon respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit refusing to reverse the judgment of conviction entered by the Northern District Court of Mississippi in the trial of this case following a jury verdict of guilty which it is submitted was erroneously reached due to the refusal of defendant's

requested instruction informing the jury that should their verdict be that the defendant was not guilty only be reason of insanity, he would be committed pursuant to the requirement of the Insanity Defense Reform Act of 1984.

#### OPINIONS BELOW

The opinion of the Court of Appeals is reported as United States v. Shannon, 981 F.2d 759 (5th Cir. 1993), and is Exhibit "A" to this petition.

#### JURISDICTION

The court of appeals opinion in this case was filed on January 12, 1993. No petition for rehearing was filed. This court's jurisdiction is invoked pursuant to Title 28, U.S.C. Section 1254(1).

#### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The sole issue presented turns on the Insanity Defense Reform Act of 1984, 18 U.S.C. §§17, 4241 et seq. Under that Act, Congress for the first time enacted a comprehensive substantive and procedural scheme to deal with the presentation and consideration of the insanity defense at trial, and the disposition of those defendants acquitted as a result of that defense.

#### STATEMENT OF THE CASE

The United States District Court for the Northern District of Mississippi, Eastern Division, had jurisdiction of this case pursuant to Title 18, U.S.C. Section 3231.

The defendant was indicted for having possessed a firearm, being a prior convicted felon. The indictment charged that the defendant had been convicted of at least three prior felonies and under 18 U.S.C. 924(e) was subject to the enhanced punishment of not less than fifteen years imprisonment, without probation or parole.

He was psychologically evaluated prior to trial. Although found to be suffering from a mental illness, he was found capable of understanding the nature of the charge against him and of cooperating with his counsel in his defense.

The case proceeded to trial on the defense of insanity. In its case in chief, the government submitted sufficient evidence, if believed by the jury, to prove beyond a reasonable doubt the following essential elements of the crime charged: (a) that the defendant Terry Lee Shannon did possess on August 25, 1990, within the boundaries of the Northern District of Mississippi a Sterling Arms .22 long rifle pistol, (b) that the pistol had moved in interstate commerce, and (c) that prior to possessing the pistol Terry Lee Shannon had been convicted of a felony crime punishable by a sentence of more than one year in prison. The principal issue for determination by the jury was the defense of insanity.

The Government's proof indicated that Sergeant Marvin Brown of the Tupelo Police Department stopped the defendant while defendant was walking down a street in the early morning hours. Upon being stopped, defendant walked across the street to the police car. After being told he would need to accompany the officer back to the station, the defendant told the officer he did not want to live anymore, whereupon he walked back across the street, reached inside his coat and pulled out a pistol with which he shot himself in the chest.

Two psychologists testified, one an employee of the Federal Bureau of Prisons and one appointed for the defense. Both witnesses agreed that the defendant suffered from a serious mental illness at the time of trial, at the time of the offense, and for some years before. As a result of this testimony, the court instructed the jury on the defense of insanity. The court refused to instruct the jury that if acquitted due to insanity, the defendant would be committed for treatment in accordance with the provisions of Insanity Defense Reform Act. The reason given by the court for refusing the instruction was prior Fifth Circuit authority which pre-dated the Insanity Defense Reform Act of 1984.

The jury returned a verdict of guilty on which judgment was entered, and the Court sentenced the defendant to serve 15 years without the possibility of probation or parole.

The defendant timely perfected his appeal to the Fifth Circuit Court of Appeals, which affirmed the conviction.

#### WHY THE WRIT SHOULD BE GRANTED

Certiorari should be granted in this case because this case presents an important question of federal law which has not been, but ought to be, settled by this Court. The various positions taken by the circuits which have considered this question are presented below, but at this time no circuit has decided for the position advocated in this petition. However, the decisions of the circuits under the 1984 Act have largely been dictated by stare decisis following precedents which predate the 1984 Act and which were developed when there were no provisions in the law for commitment of defendants acquitted because of insanity. Unless this Court construes the 1984 Act as it affects the issue presented, the change contemplated by Congress as a result of its 1984 reform is stymied because of precedent which predates the 1984 Act. This is an appropriate case for this Court in its supervisory power to make uniform the application of the Insanity Defense Reform Act of 1984 in all circuits.

Although the conflict which has developed among the four circuits construing the issue presented under the 1984 Act may be relatively minor, there is a conflict between those circuits and the D.C. Circuit, which operates under a similar statutory provision which served as the model for the Insanity Reform Act of 1984. Lyles v. United States, 254 F.2d 725 (D.C. Cir. 1957), cert. den. 381 U.S. 941.

The specific sections of the Act which are relevant to this issue are found at 18 U.S.C. §§ 17, 4242, and 4243. All three sections are

reproduced in their entirety in the Appendix to this Petition. Section 17 defines insanity essentially in terms of the M'Naughten Rule and places the burden to establish the defense on the defendant. Section 4242(b) creates a special verdict of "not guilty only by reason of insanity" in insanity defense cases, in addition to the general verdicts of guilty and not guilty. Section 4243 provides for mandatory commitment for treatment of one found not guilty only by reason of insanity until such time as the court can certify that the defendant no longer poses a danger to others or to property.

Until the adoption of the Act, the defense of insanity in the federal system was strictly a matter of the common law, with the sole exception being the District of Columbia Code. There was no special verdict in the other federal circuits of not guilty by reason of insanity, and there was no provision in any of the Circuits (excluding D.C.) for the commitment of one acquitted when the defense of insanity was successful. If commitment was needed to protect the public safety, the federal system relied on the State involved to pursue the commitment. United States v. McCracken, 488 F.2d 406 (5th Cir. 1974). This state of affairs was remedied by the Insanity Defense Reform Act of 1984.

Lyles and other cases following its rationale note that jurors know by common knowledge the effect of "guilty" and "not guilty" verdicts. Jurors do not know the effect of a verdict of "not guilty by reason of insanity," especially where a special statute requires the commitment of the defendant until he no longer poses a danger to the public. By informing the jury of the effect of that sentence, the court is only

giving the jury the same knowledge regarding the special insanity verdict that it already possesses regarding the two general verdicts. By doing so the court is avoiding the likelihood that because of prejudice toward those impaired by mental illness and fear for the safety of the public if the defendant, possibly dangerous, "goes free" due to their verdict, a jury will convict one otherwise entitled to be acquitted because of insanity.

This reasoning has been very persuasive among the states, who face this same problem in administering their procedures on the insanity defense. There are apparently 22 State jurisdictions which now endorse the giving of such an instruction. Annot., "Instruction In State Criminal Proceeding In Which Defendant Pleads Insanity As To Hospital Confinement In Event Of Acquittal," 81 A.L.R.4th 659 (1990). The opportunity to decide the question apparently does not arise frequently, but when it is does there is a definite trend among the states in favor of the position advanced in this petition. e.g., Erdman v. State, 315 Md 46, 553 A.2d 244 (1989); State v. Shickles, 760 P.2d 291 (Utah 1988).

The ABA Standards on Criminal Justice adopt the reasoning of Lyles and its progeny and recommend that an instruction similar to that requested in this case be given. II ABA Standards for Criminal Justice No. 7-6.8 (2d ed. 1986).

This reasoning was also persuasive to the Senate committee considering the Insanity Defense Reform Act of 1984 during its adoption:

The Committee endorses the procedure used in the District of Columbia whereby the jury, in a case in which the insanity defense has been raised may be instructed on the effect of a verdict of not guilty by reason of insanity. If a defendant requests that an instruction not be given, it is within the discretion of the court whether to give it or not. S.Rept.

The reasoning has had little chance to persuade those circuits considering the issue in light of the 1984 Act. The courts have considered that since the requested result was not mandated by the 1984 Act, they are bound by pre-Act precedent not to permit the instruction. United States v. Frank, 956 F.2d 872 (9th Cir. 1991), cert. den. 113 S.Ct. 363 (1992) (In an opinion on the denial of certiorari, Justice Stevens stated that he felt the district court should be required to give the instruction); United States v. Barnett, 968 F.2d 1189 (11th Cir. 1992); United States v. Shannon, 981 F.2d 759 (5th Cir. 1993).

In United States v. Blume, 967 F.2d 45 (2d Cir. 1992) the opinion of the court, per Judge Lumbard, permits the instruction to be given in the discretion of the court. The panel was however split three ways on what the rule ought to be. Judge Newman, concurring in the decision not to reverse, thinks the instruction ought always to be given. 967 F.2d at 50. Judge Winter, concurring in the result, thinks the instruction ordinarily ought not to be given. 967 F.2d at 53.

One other circuit has considered the issue. In United States v. Neavill, 868 F.2d 1000 (8th Cir. 1989), vacated on grant of en banc rehearing 877 F.2d 1394, app. dismissed on motion of the defendant 886 F.2d 220, a panel of the 8th Circuit found that the Insanity Defense Reform Act permitted it to reexamine former precedent in that circuit and adopt the position that the jury should be instructed that the defendant would be committed in the event of an insanity finding. The panel decision was later vacated by operation of law when an en banc

rehearing was granted, and the appeal was later dismissed by the defendant so the 8th Circuit en banc never reconsidered Neavill.

The better reasoned authority and the trend of authority among all but the federal circuits favor the position advocated in this petition. The principal impediment to its adoption in the federal circuits is not any defect in its merit, but rather a rigid application of stare decisis which takes little or no account of the changes brought about by the 1984 Act. With the Barnett, Blume, and Shannon decisions, the status of the issue in the circuits has had further development since the rejection of certiorari in the Frank case, and this issue is now ripe for decision by this Court.

Congress adopted a policy which enables a jury to consider this issue solely on the merits of the psychiatric, psychological, and other proof adduced regarding criminal responsibility, but that policy is being frustrated as a result of circuit precedent adopted long before the Act was adopted. This court is the only recourse this and other defendants have to obtain a rule which permits them to have a jury determine the issue of their criminal responsibility free from fear that a verdict of not guilty solely by reason of insanity may free a dangerous defendant for further depredations on the public.

## CONCLUSION

For the reasons stated, the petition for certiorari ought to be granted.

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## APPENDICES

Appendix A	United States v. Shannon, 981 F.2d 759 (5th Cir. 1993).
Appendix B	Judgment in a Criminal Case
Appendix C	Relevant parts of the Insanity Defense Reform Act of 1984

UNITED STATES of America,  
Plaintiff-Appellee,

v.

Terry Lee SHANNON, Defendant-  
Appellant.

No. 92-7294.

United States Court of Appeals,  
Fifth Circuit.

Jan. 12, 1993.

Jury convicted defendant of possession of firearm by convicted felon despite defendant's insanity defense following trial in the United States District Court for the Northern District of Mississippi, L.T. Senter, Jr., Chief Judge. Defendant appealed. The Court of Appeals, Jerre S. Williams, Circuit Judge, held that defendant was not entitled to jury instruction about mandatory commitment procedures accompanying verdict of not guilty only by reason of insanity.

Affirmed.

#### 1. Criminal Law Ⓒ749

Punishment and sentencing are matters entrusted exclusively to trial judge and jury has no concern with consequences of its verdict.

#### 2. Criminal Law Ⓒ790

Defendant charged with possession of firearm by convicted felon was not entitled to jury instruction stating consequences of jury finding accused not guilty by reason of insanity. 18 U.S.C.A. §§ 4241-4247.

Appeal from the United States District Court for the Northern District of Mississippi.

Before WILLIAMS, HIGGINBOTHAM  
and BARKSDALE, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

Terry Lee Shannon appeals his conviction for firearm possession. Shannon pleaded insanity at his trial, and the district court instructed the jury on the insanity defense. The court, however, refused to instruct the jury about the mandatory commitment procedures that accompany a jury verdict of "not guilty only by reason of insanity" ("NGI"). Shannon contends that the court's refusal to reveal the required disposition of a defendant acquitted because of his insanity was error in light of the Insanity Defense Reform Act of 1984, 18 U.S.C. §§ 4241-4247 ("IDRA" or "Act"). We affirm the district court's decision. We agree that district courts possess no discretion to offer such instructions.

#### I. FACTS AND PRIOR PROCEEDINGS

The principal facts are uncontroverted and largely stipulated. At about 4:00 a.m. on the morning of August 25, 1990, Sergeant Marvin Brown of the Tupelo Police Department was on roving patrol and stopped Shannon as he walked down a Tupelo street. The officer told Shannon that a detective wanted to speak with him and asked Shannon to accompany him back to the station. Shannon then told Sergeant Brown that he did not want to live anymore, whereupon he walked across the street, pulled a pistol from his coat or shirt, and shot himself in the chest. The wound was not fatal.

Shannon had acquired the gun the day before from his son, with whom Shannon had ridden to the Tupelo Airport where the son was catching a return flight to New York. When Shannon learned his son was planning to board the plane with the pistol, he retrieved it because he knew it was unlawful to go through airport security with a firearm. Shannon also knew as a prior convicted felon that he could not lawfully possess a firearm himself, and he later stated that he had planned to carry the gun to his mother's house until he could deliver it to his parole officer.

In the early morning hours of August 25, Shannon had left his girlfriend's house and began walking to his mother's house, purportedly to leave the gun with her. Before he reached the house, he had been stopped and questioned by Sergeant Brown, and this led to Shannon shooting himself. He was indicted for possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1).

Before trial, the defense moved to have Shannon declared mentally incompetent to stand trial.<sup>1</sup> The court scheduled a competency hearing, heard expert testimony regarding Shannon's ability to participate in his trial, and concluded that he was able "to understand the nature and consequences of the proceedings against him and to assist properly in his defense." The case proceeded to trial on the defense of insanity. Shan-

non concedes that the Government presented evidence at trial that, if believed by the jury, was sufficient to prove the essential elements of the crime charged. The jury's role then became the consideration of Shannon's insanity defense.

Shannon concedes he "unquestionably knew as an abstract proposition that it was unlawful for him to possess a firearm." He urges, however, that the question remains whether he appreciated the wrongfulness of his acts under the circumstances prevailing at the time of the offense. Dr. Richard G. Ellis, a psychologist with the Bureau of Prisons, and Dr. Michael D. Roberts, a local clinical psychologist, testified at Shannon's trial regarding his mental condition at that time. The precise nature of their diagnoses differed, but they both agreed that Shannon suffered from mental illness at the time of trial and possibly at the time of the shooting. Despite their acknowledgment of Shannon's chronic mental problems, however, the experts agreed that Shannon's mental illness was not so severe as to render him legally insane at the time of the offense and thus unable to appreciate the nature, quality, and wrongfulness of his actions.

The court properly instructed the jury on the insanity defense.<sup>2</sup> It refused Shannon's request to inform the jury that an NGI verdict would result in Shannon's involuntary commitment in accordance with § 4243(e) of

1. 18 U.S.C. § 4241, Determination of mental competency to stand trial, establishes the procedure for evaluating whether a defendant is "suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense."

2. The district court defined "insanity" as follows: "The defendant was insane as the law defines that term only if, as a result of a severe mental disease or defect, the defendant was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense." This definition comports

the IDRA.<sup>3</sup> The jury rejected Shannon's insanity defense and returned a guilty verdict. Because Shannon already had three previous convictions, the district court sentenced him to serve fifteen years without the possibility of probation or parole pursuant to 18 U.S.C. § 924(e)(1). Shannon's appeal is timely.

## II. DISCUSSION

This case presents a single issue: did the district court err in refusing to instruct the jury that Shannon would be committed until he was no longer dangerous if the jury found him "not guilty only by reason of insanity"? The issue arises because it is urged that the established law was changed by the IDRA of 1984.

### A. The Law Before the 1984 Act

[1] The well-established general principle is that a jury has no concern with the consequences of its verdict. As the Supreme Court stated succinctly in *Rogers v. United States*, "the jury [has] no sentencing function and should reach its verdict without regard to what sentence might be imposed." 422 U.S. 35, 40, 95 S.Ct. 2091, 2095, 45 L.Ed.2d 1 (1975). This Circuit has long recognized that punishment and sentencing are matters entrusted exclusively to the trial judge. We

with the statutory provisions of 18 U.S.C. § 17.

3. Section 4243(e) ensures that a federal criminal defendant found not guilty by reason of insanity will not be released onto the streets. It provides that "the Attorney General shall hospitalize the person for treatment in a suitable facility" until a State assumes responsibility for the defendant's care and treatment or until it can be certified that his release will not pose a substantial danger to others or to property.

Shannon's counsel attempted to make this mandatory confinement known to the jurors.

have held specifically that juries should not ordinarily be informed about the consequences of an NGI verdict. See *United States v. McCracken*, 488 F.2d 406, 423 (5th Cir.1974) ("Except where a special provision mandates a jury role in assessment or determination of penalty, the punishment provided by law for offenses charged is a matter exclusively for the court and should not be considered by the jury in arriving at a verdict as to guilt or innocence.").

[2] *McCracken*, a pre-IDRA case, posed an issue similar to the one we face today. We reversed the defendant's murder conviction because the trial court instructed the jury that if it returned an NGI verdict, the defendant would be freed. The jury charge embodied a then-accurate statement of the law; no federal statutory scheme yet provided for the disposition of defendants acquitted due to insanity. We recognized, however, that the court's instruction possibly served to coerce or induce a guilty verdict since jurors at that time were assumed to be fearful of those with mental illness and might convict insane defendants based upon a perceived need to protect society rather than face the risks resulting from their immediate release onto the streets. We lamented that the absence of federal commitment procedures led to heavy reliance upon state authorities to institute commitment proceedings against

During a jury instruction conference, counsel suggested two alternative instructions: (1) "In the event it is your verdict that the defendant is not guilty only by reason of insanity, it is required that the Court commit the defendant," or (2) "[Y]ou should know that it is required that the Court commit defendant to a suitable hospital facility until such time as the defendant does not pose a substantial risk of bodily injury to another or serious danger to the property of another." The trial judge rejected both versions.

those acquitted by reason of insanity. We labelled such dependence one of the "the harsh effects of the federal statutory silence."

In the *McCracken* opinion, we noted the District of Columbia Circuit's decision in *Lyles v. United States*, 254 F.2d 725, 728 (D.C.Cir.1957) (en banc), cert. denied, 356 U.S. 961, 78 S.Ct. 997, 2 L.Ed.2d 1067 (1958). In *Lyles*, a divided court held that a jury should be informed that such an NGI verdict would result in defendant's involuntary commitment. But a key feature distinguished *Lyles*. The case arose under the D.C. Code, which Congress had amended to provide for mandatory commitment of a defendant who asserted a successful insanity defense.<sup>4</sup> Despite our apparent appreciation for such a statute, we noted that the absence of comparable federal legislation made the D.C. Circuit's approach inapposite for other circuits. *McCracken*, 488 F.2d at 422. We therefore concluded in *McCracken* that, absent an explicit statutory directive mandating an enhanced jury role, it was inappropriate for jurors to consider possible post-trial punishments. *Id.* at 423.

*McCracken* was a natural descendant of our earlier decision in *Pope v. United States*, 298 F.2d 507 (5th Cir.1962), cert. denied, 381 U.S. 941, 85 S.Ct. 1776, 14 L.Ed.2d 704 (1965). In *Pope*, we affirmed the trial court's refusal to inform the jury about what would occur if they found Pope "not guilty only by reason of insanity." There too, we expressly rejected the *Lyles* approach, holding that "[d]ifferent rules and different statutes apply to the Courts of the District of Columbia." *Id.* at 509. Emphasizing our long-standing

4. The Code provision did not by its own terms mandate the giving of such an instruction. See *Lyles*, 254 F.2d at 728-29.

5. Shannon has not shown that in deliberating, the jury in this case actually entertained these

focus on the unique duties of judges and juries, we said:

Unless otherwise provided by statute, it is the duty of the court to impose sentence, or make such other disposition of the case as required by law, after the facts have been decided by the jury. To inform the jury that the court may impose minimum or maximum sentence, will or will not grant probation, when a defendant will be eligible for a parole, or other matters relating to disposition of the defendant, tend to draw the attention of the jury away from their chief function as sole judges of the facts, open the door to compromise verdicts and to confuse the issue or issues to be decided. In a case of this nature what they were to decide was whether the defendant was guilty or not.

*Id.* at 508 (emphasis added).

### B. The IDRA's Impact

Shannon argues strongly that the trial court's ruling left the jury with no guidance as to the actual implications of its verdict. As a result, the confused jury fell captive to the misconception that only two real options existed—guilty (go to jail) or not guilty/NGI (go free). Because they feared that a dangerous, mentally-ill person would be released if they returned an NGI verdict, they were induced to reject his insanity defense, however meritorious it may have been.<sup>5</sup> Appealing to the *McCracken* court's concern that uninformed and frightened juries might convict while still questioning a defendant's sanity, Shannon urges us to apply "common sense

misconceptions, failed to follow the judge's instructions, or considered extraneous factors that colored its verdict.

and justice".<sup>6</sup>

Shannon asserts that Congress's passage of the IDRA constitutes a statutory change that mandates, or at least authorizes, the instruction he seeks. Because the justification for a different rule in different parts of the federal system has now been removed, Shannon argues, the practice announced in *Lyles* must now be applied nationwide. We must disagree that the IDRA alters the calculus. The statute enacted a comprehensive scheme for dealing with insanity in federal criminal cases. Yet it has no provision expanding the jury's role. It has no wording that even touches upon this role. It leaves the jury solely with its customary determination of guilt or innocence.

For support, Shannon cites the Eighth Circuit's opinion in *United States v. Neavill*, 868 F.2d 1000 (8th Cir.), vacated, reh'g en banc granted, 877 F.2d 1394 (8th Cir.), appeal dismissed, 886 F.2d 220 (8th Cir.1989). In *Neavill*, the panel found that the IDRA permitted it to re-examine former precedent, in which the court had joined this Circuit and others in rejecting the *Lyles* rationale. In reaching its decision, the court relied heavily on a Senate Committee report that endorsed the D.C. Circuit's rationale:

The [Senate] Committee endorses the procedure used in the District of Columbia whereby the jury, in a case in which the insanity defense has been raised, may be instructed on the effect of a verdict of not

guilty by reason of insanity. If a defendant requests that the instruction not be given, it is within the discretion of the court whether to give it or not.

S.Rep. No. 98-225, 98th Cong., 1st Sess. 240, reprinted in 1984 U.S.Code Cong. & Admin.News 3182, 3422 (footnotes omitted). *Neavill*, however, has no current precedential value. As the citation makes clear, it was vacated by operation of law when rehearing en banc was granted and then was dismissed at *Neavill*'s request prior to reconsideration by the full Circuit.

Shannon likewise emphasizes the Act's legislative history and insists that it illustrates Congress's intentions. We agree, however, with the Ninth Circuit's refusal to disregard the statute's clarity by embracing the committee report:

This statement does not have the force of law nor does it purport to interpret or explain ambiguous language in the statute regarding instructions. See *International Brotherhood of Electrical Workers Local Union No. 474 v. NLRB*, 814 F.2d 697, 712 (D.C.Cir.1987) ("While a committee report may ordinarily be used to interpret unclear language contained in a statute, a committee report cannot serve as an independent source having the force of law.... [C]ourts have no authority to enforce principles gleaned solely from legislative history that has no statutory reference point." (emphasis in original) (citations omitted)).

could assume that due to overcrowded mental hospitals, strapped social services budgets, sympathetic judges, etc., a defendant will be released after only a short period of commitment. To combat the prospect of early release, the jury could simply opt to find him guilty. The mandatory instruction Shannon seeks, therefore, seems to be fraught with the same prejudice and jury confusion he wants to avoid.

6. The instruction Shannon desires could actually work to his disadvantage and cause him more harm than good. As the Third Circuit perceptively noted in *Government of V.I. v. Fredericks*: "A juror who is convinced that a defendant is dangerous, but who believes [the defendant] did not ... commit the [offense] charged, might be willing to compromise on a verdict of not guilty by reason of insanity rather than insist on an acquittal." 578 F.2d 927, 936 (3d Cir.1978). Moreover, a jury

*United States v. Frank*, 956 F.2d 872, 881 (9th Cir.1991), cert. denied, — U.S. —, 113 S.Ct. 363, 121 L.Ed.2d 276 (1992).<sup>7</sup>

In *McCracken*, 488 F.2d at 423, we said that a specific statutory provision was required to justify an enhanced jury role. We do not have it here. The IDRA does not expressly provide that a jury be instructed regarding mandatory commitment procedures. In contrast, Congress explicitly dealt with what juries should be told by way of instruction when a psychiatric defense is raised. 18 U.S.C. § 4242(b) provides:

If the issue of insanity is raised ... the jury shall be instructed to find, or, in the event of a nonjury trial, the court shall find the defendant—

- (1) guilty;
- (2) not guilty; or
- (3) not guilty only by reason of insanity.

(emphasis added)

It is noteworthy that Congress was explicit in directing what issues should be raised, yet said nothing about informing juries of the consequences of any of the three choices. Courts may not properly attempt to discern what Congress, while remaining quiet, assumed would happen. Absent an affirmative statutory requirement that juries be granted a sentencing role, we adhere to the established axiom that it is inappropriate for a jury to consider or be informed about the consequences of its verdict.

Finally, the other peripheral sources that Shannon cites for support are likewise devoid of statutory anchors and do not compel a different result. Specifically, Shannon notes that the ABA Standards address the issue and recommend that the proposed instruc-

tion be given. II ABA Standards for Criminal Justice No. 7-6.8 (2d ed. 1986). Moreover, he insists that the prevailing trend among the states favors requiring or authorizing the instruction. Thomas M. Fleming, Annotation, *Instructions in State Criminal Case in which Defendant Pleads Insanity as to Hospital Confinement in Event of Acquittal*, 81 A.L.R. 4th 659, 667 (1990). These sources are no authority to abandon our long-standing precedents without congressional mandate. Our decision today is grounded upon the traditional roles of judges and juries and rooted in the Act's plain language.

Three other circuits have examined the issue. None has taken the passage of the Act to mandate such an instruction. *Frank*, 956 F.2d at 881; *United States v. Blume*, 967 F.2d 45, 49 (2d Cir.1992); *United States v. Barnett*, 968 F.2d 1189, 1192 (11th Cir.1992). Two of the Circuits permit judges to provide such information, one in narrow and possibly justifiable circumstances and the other more broadly.

In *Frank*, a divided panel of the Ninth Circuit affirmed the district court's refusal to instruct the jury on the effect of an NGI verdict, holding that the IDRA fails to enlarge the jury's role beyond the traditional guilt/innocence determination. But the Court qualified its holding, concluding that "prosecutorial misconduct" which suggests that those persons found innocent by reason of insanity are released into society properly may warrant a curative instruction to correct the error and abate jury anxiety or confusion. 956 F.2d at 881. In *Barnett*, the Eleventh Circuit followed the holdings of *Rogers* and *McCracken*: "Punishment, or the lack

the district court must give the disputed instruction to the jury.

7. Justice Stevens wrote an opinion "respecting the denial" of the writ of certiorari in *Frank*. He stated that the rule should be that

thereof, is a matter entrusted to the trial judge." 968 F.2d at 1192. The opinion does not expressly discuss whether instructional discretion exists in certain cases, but seems to intimate that it does not. A recent panel of the Second Circuit was also divided on the issue. *Blume*, 967 F.2d at 50. Judge Lumbard, writing for the Court, stated that the Senate Committee report's language leaves the instructional decision to the district court's discretion; Judge Newman, writing separately, urges that the instruction should always be given unless the defendant requests its omission, but he adjusted his position to join Judge Lumbard and give the Court a majority position in favor of the discretionary approach. Judge Winter, also concurring separately in the result but disagreeing with the NGI analysis, seems to adopt a variety of the *Frank* rationale, urging that the instruction typically should not

be given. Less the jury has evinced a belief that those acquitted NGI usually go free.

We adhere to our established precedents since there is no statutory directive that opens up to juries a role in the assessment or determination of penalties. We properly are concerned about possible unfortunate consequences of any alteration of the traditional role of the jury. We are convinced that a carefully limited and precise statutory mandate must be required. There is none here.

### III. CONCLUSION

We find the established law unchanged by the 1984 Insanity Defense Reform Act. The district court acted properly in refusing an instruction stating the consequences of finding the accused not guilty only by reason of insanity.

AFFIRMED.

FILED

## United States District Court

APR 21 1992

NORTHERN

District of

MISSISSIPPI

NORMAN L. GILLESPIE, CLERK

3v *V. Adams*

UNITED STATES OF AMERICA

V.

TERRY LEE SHANNON

(Name of Defendant)

### JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

Case Number: CRE90-170

THOMAS TROUT

Defendant's Attorney

#### THE DEFENDANT:

- ☐ pleaded guilty to count(s) \_\_\_\_\_  
☒ was found guilty on count(s) 1 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18/922(g)(1) and 924(e)(1)	POSSESSION OF A FIREARM BY A PERSON WITH THREE (3) PRIOR CONVICTIONS PUNISHABLE BY TERM OF IMPRISONMENT EXCEEDING ONE (1) YEAR	08/25/90	1

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) \_\_\_\_\_ and is discharged as to such count(s).  
☐ Count(s) \_\_\_\_\_ (is)(are) dismissed on the motion of the United States.  
☒ It is ordered that the defendant shall pay a special assessment of \$ 50 for count(s) 1, which shall be due ☒ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 587-42-1839

Defendant's Date of Birth: 03/04/54

Defendant's Mailing Address:

526 NORTH GREEN

TUPELO, MS 38801

Defendant's Residence Address:

526 NORTH GREEN

TUPELO, MS 38801

APRIL 16, 1992

Date of Imposition of Sentence

*L.T. Senter, Jr.*  
Signature of Judicial Officer

L.T. SENTER, JR., CHIEF U.S. DISTRICT JUDGE

Name & Title of Judicial Officer

4/21/92  
Date

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*Entered 4/22/92*

Defendant: TERRY LEE SHANNON  
Case Number: CRE90-170

Judgment—Page 2 of 4

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of FIFTEEN (15) YEARS

☒ The court makes the following recommendations to the Bureau of Prisons:

THE COURT RECOMMENDS THAT THE DEFENDANT BE INCARCERATED IN A FACILITY WHERE HE CAN RECEIVE MENTAL HEALTH TREATMENT AND THERAPY.

☒ The defendant is remanded to the custody of the United States marshal.  
☐ The defendant shall surrender to the United States marshal for this district.

☐ at \_\_\_\_\_ a.m.  
☐ at \_\_\_\_\_ p.m. on \_\_\_\_\_  
☐ as notified by the United States marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.  
☐ before 2 p.m. on \_\_\_\_\_  
☐ as notified by the United States marshal.  
☐ as notified by the probation office.

## RETURN

I have executed this judgment as follows:

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_ at \_\_\_\_\_

\_\_\_\_\_, with a certified copy of this judgment.

\_\_\_\_\_  
United States Marshal

By

\_\_\_\_\_  
Deputy Marshal

Defendant: TERRY LEE SHANNON  
Case Number: CRE90-170

Judgment—Page 3 of 4

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of \_\_\_\_\_

FIVE (5) YEARS.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

- ☒ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.
- ☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.
- ☒ The defendant shall not possess a firearm or destructive device.

THE DEFENDANT SHALL PARTICIPATE IN A PROGRAM FOR THE TREATMENT OF SUBSTANCE ABUSE, TO INCLUDE TESTING TO DETERMINE WHETHER OR NOT THE DEFENDANT HAS REVERTED TO THE USE OF DRUGS OR ALCOHOL, UNDER THE DIRECTION OF THE PROBATION OFFICER.

THE DEFENDANT SHALL PARTICIPATE IN A MENTAL HEALTH PROGRAM APPROVED BY THE PROBATION OFFICER.

## STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: TERRY L. SHANNON  
Case Number: CRE90-170

Judgment—Page 4 of 4

## STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

## Guideline Range Determined by the Court:

Total Offense Level: 10

Criminal History Category: VI

Imprisonment Range: 15 ~~XXXXXXXXXXXX~~ YEARS

Supervised Release Range: 3 to 5 years

Fine Range: \$ 2,000 to \$ 20,000

☒ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: \$

☐ Full restitution is not ordered for the following reason(s):

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following reason(s):

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## § 17. Insanity defense

(a) **Affirmative defense.**—It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

(b) **Burden of proof.**—The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

(Added Pub.L. 98-473, Title II, § 402(a), Oct. 12, 1984, 98 Stat. 2057, § 20, redesignated Pub.L. 99-646, § 34(a), Nov. 10, 1986, 100 Stat. 3599.)

the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility—

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and

(2) for an additional reasonable period of time until—

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed; or

(B) the pending charges against him are disposed of according to law;

whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the trial to proceed, the defendant is subject to the provisions of section 4246.

(e) **Discharge.**—When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. The court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial. Upon discharge, the defendant is subject to the provisions of chapter 207.

(f) **Admissibility of finding of competency.**—A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a

defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.

(As amended Oct. 12, 1984, Pub.L. 98-473, Title II, § 403(a), 98 Stat. 2057.)

#### REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 876 (May 13, 1930, ch. 254, § 6, 46 Stat. 271).

Changes were made in phraseology and surplusage omitted.

### § 4242. Determination of the existence of insanity at the time of the offense

(a) **Motion for pretrial psychiatric or psychological examination.**—Upon the filing of a notice, as provided in Rule 12.2 of the Federal Rules of Criminal Procedure, that the defendant intends to rely on the defense of insanity, the court, upon motion of the attorney for the Government, shall order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(b) **Special verdict.**—If the issue of insanity is raised by notice as provided in Rule 12.2 of the Federal Rules of Criminal Procedure on motion of the defendant or of the attorney for the Government, or on the court's own motion, the jury shall be instructed to find, or, in the event of a nonjury trial, the court shall find the defendant—

(1) guilty;

(2) not guilty; or

(3) not guilty only by reason of insanity.

(As amended Oct. 12, 1984, Pub.L. 98-473, Title II, § 403(a), 98 Stat. 2059.)

#### REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 877 (May 13, 1930, ch. 254, § 7, 46 Stat. 272).

Minor change was made in phraseology.

### § 4243. Hospitalization of a person found not guilty only by reason of insanity

(a) **Determination of present mental condition of acquitted person.**—If a person is found not guilty only by reason of insanity at the time of the offense charged, he shall be committed to a suitable facility until such time as he is eligible for release pursuant to subsection (e).

(b) **Psychiatric or psychological examination and report.**—Prior to the date of the hearing, pursuant to subsection (c), the court shall order that a psychiatric or psychological examination of

the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) **Hearing.**—A hearing shall be conducted pursuant to the provisions of section 4247(d) and shall take place not later than forty days following the special verdict.

(d) **Burden of proof.**—In a hearing pursuant to subsection (c) of this section, a person found not guilty only by reason of insanity of an offense involving bodily injury to, or serious damage to the property of, another person, or involving a substantial risk of such injury or damage, has the burden of proving by clear and convincing evidence that his release would not create a substantial risk of bodily injury to another person or serious damage of property of another due to a present mental disease or defect. With respect to any other offense, the person has the burden of such proof by a preponderance of the evidence.

(e) **Determination and disposition.**—If, after the hearing, the court fails to find by the standard specified in subsection (d) of this section that the person's release would not create a substantial risk of bodily injury to another person or serious damage of property of another due to a present mental disease or defect, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility until—

(1) such a State will assume such responsibility; or

(2) the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment, would not create a substantial risk of bodily injury to another person or serious damage to property of another; whichever is earlier. The Attorney General shall continue periodically to exert all reasonable efforts to cause such a State to assume such responsibility for the person's custody, care, and treatment.

(f) **Discharge.**—When the director of the facility in which an acquitted person is hospitalized pursuant to subsection (e) determines that the person has recovered from his mental disease or defect to such

an extent that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment, would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the Government. The court shall order the discharge of the acquitted person or, on the motion of the attorney for the Government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether he should be released. If, after the hearing, the court finds by the standard specified in subsection (d) that the person has recovered from his mental disease or defect to such an extent that—

(1) his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall order that he be immediately discharged; or

(2) his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall—

(A) order that he be conditionally discharged under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been prepared for him, that has been certified to the court as appropriate by the director of the facility in which he is committed, and that has been found by the court to be appropriate; and

(B) order, as an explicit condition of release, that he comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

The court at any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment.

(g) **Revocation of conditional discharge.**—The director of a medical facility responsible for administering a regimen imposed on an acquitted person conditionally discharged under subsection (f) shall notify the Attorney General and the court having jurisdiction over the person of any failure of the person to comply with the regimen. Upon such notice, or upon other probable cause to believe that the person has failed to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, the person may be arrested, and,

upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. The court shall, after a hearing, determine whether the person should be remanded to a suitable facility on the ground that, in light of his failure to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, his continued release would create a substantial risk of bodily injury to another person or serious damage to property of another.

(h) **Limitations on furloughs.**—An individual who is hospitalized under subsection (e) of this section after being found not guilty only by reason of insanity of an offense for which subsection (d) of this section creates a burden of proof of clear and convincing evidence, may leave temporarily the premises of the facility in which that individual is hospitalized only—

(1) with the approval of the committing court, upon notice to the attorney for the Government and such individual, and after opportunity for a hearing;

(2) in an emergency; or

(3) when accompanied by a Federal law enforcement officer (as defined in section 115 of this title).

(As amended Pub.L. 98-473, Title II, § 403(a), Oct. 12, 1984, 98 Stat. 2059; Pub.L. 100-690, Title VII, § 7043, Nov. 18, 1988, 102 Stat. 4400.)

#### REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 878 (May 13, 1930, ch. 254, § 8, 46 Stat. 272).

Changes were made in translations and phraseology, and unnecessary words omitted.

### § 4244. Hospitalization of a convicted person suffering from mental disease or defect

(a) **Motion to determine present mental condition of convicted defendant.**—A defendant found guilty of an offense, or the attorney for the Government, may, within ten days after the defendant is found guilty, and prior to the time the defendant is sentenced, file a motion for a hearing on the present mental condition of the defendant if the motion is supported by substantial information indicating that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility. The court shall grant the motion, or at any time prior to the sentencing of the defendant shall order such a hearing on its own motion, if it is of the opinion that there is reasonable cause to believe that the defendant may presently be suffering from a men-

tal disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility.

(b) **Psychiatric or psychological examination and report.**—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c). In addition to the information required to be included in the psychiatric or psychological report pursuant to the provisions of section 4247(c), if the report includes an opinion by the examiners that the defendant is presently suffering from a mental disease or defect but that it is not such as to require his custody for care or treatment in a suitable facility, the report shall also include an opinion by the examiner concerning the sentencing alternatives that could best accord the defendant the kind of treatment he does need.

(c) **Hearing.**—The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) **Determination and disposition.**—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect and that he should, in lieu of being sentenced to imprisonment, be committed to a suitable facility for care or treatment, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for care or treatment in a suitable facility. Such a commitment constitutes a provisional sentence of imprisonment to the maximum term authorized by law for the offense for which the defendant was found guilty.

(e) **Discharge.**—When the director of the facility in which the defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered from his mental disease or defect to such an extent that he is no longer in need of custody for care or treatment in such a facility, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. If, at the time of the filing of the certificate, the provisional sentence imposed pursuant to subsection (d) has not expired, the court shall proceed finally to sentencing and may modify the provisional sentence.

(Added Sept. 7, 1949, c. 535, § 1, 63 Stat. 686, as amended Oct. 12, 1984, Pub.L. 98-473, Title II, § 403(a) 98 Stat. 2061.)